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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA and ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF OF RESPONDENT.

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Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF CASE.

Petitioners and respondent stand in a reverse position to that occupied in the Trial Court.

Respondent, a citizen and resident of the State of Georgia, brought the action in the United States District Court for the Northern District of Ohio, Eastern Division, against the Brotherhood of Locomotive Firemen & Enginemen and its three executive officers, as defendants.

The Brotherhood is an unincorporated voluntary association, having its main office and headquarters at Cleveland, in the State of Ohio. Its members are locomotive firemen and enginemen. This occupation has been deemed a hazardous occupation, and therefore its insurance benefits are not subject to control by the Department of Insurance of the State of Ohio.

On January 1, 1926, a Department of the Association, known as the Widows' Pension Department, was organized. Its object was to provide a monthly income for widows, or widowed mothers of deceased members.

The Department was made self-sustaining and entirely separate from all other departments of the Association. There was an express stipulation to this effect in the certificates of insurance which it issued (R. 66) and in the Constitution and By-laws (R. 75).

The Association had no capital stock, and its assets consist solely of the funds accumulated from assessments made on its members.

The Association agreed that upon the death of a member it would pay to his widow, or other designated beneficiary a pension of $35.00 per month **during her lifetime**, provided she did not remarry.

Monthly assessments in stated sums were agreed upon, but it was further agreed that should the regular sums be insufficient to meet the demands upon the Department, the officers would have authority to levy additional assessments to meet the deficiency (R. 77-78).

It developed that the rates charged by the Association were hopelessly inadequate, and the Association having become alarmed by the condition of its affairs employed an actuary to make a study of the Department, prior to the 1931 Convention (R. 60). A report on the affairs of the Department was made to the General Convention held in

June and July of 1931 (R. 78). In this report it was stated that the present value of the widows' claims could be determined if the average ages of the widows were known; that the committee knew the proportion who would remarry, and that such information was available from the records of the Pension Fund. Accordingly, the "present value" of the pensions due on the matured claims was shown to be $327,079, while the assets of the Department were worth only $313,762. The committee reported that the Department was actuarially insolvent, and that such insolvency would become more apparent if it continued operation.

The committee advised (R. 82) as follows:

> "(1) That the department should be abolished.
>
> "(2) That the assets of the department should be distributed to the members.
>
> "(3) That the method of distribution be to accumulate the assessments paid by each member at 4 per cent per annum, compounded annually, to obtain the total of these assessments and interest, and to return to each member a proportion of his total, equal to the proportion which the present assets of the department bears to the grand total of assessments and interest.
>
> "(4) That members who desire to provide their widows with a monthly income on death, do so by taking out a Mutual Insurance Department certificate, payable in monthly installments at death, as explained in the Mutual Insurance Department section of our report."

The following amendment to the report was proposed (R. 73):

> "That the International President and General Secretary and Treasurer be instructed **to make a lump**

sum settlement, not to exceed $1,500.00 for each widow now on the pension roll. Widows that refuse to settle will have their names erased from the Pension Roll."

The report as amended was adopted (R. 83).

Pursuant to the action of the Convention, the General Secretary and Treasurer of the Brotherhood, on July 30, 1931, wrote a letter advising each widow of the action of the Convention. He stated that the Convention had found it necessary to discontinue the said Widows' Pension Department; that the income from the same would not be sufficient to meet the liabilities. See letter to Mrs. Ella E. Pinkston, dated July 30, 1931 (R. 68), from which we quote as follows:

> "the officers of the Brotherhood have decided to send out checks in the usual way as of August 1st, though the action of the Convention terminates such payments thereafter."

The next monthly installment was due September 1, 1931. This payment was not made.

The matter was taken up by plaintiff through her attorneys, who went to Cleveland, Ohio, for a personal interview with the officers of the Association. Plaintiff's counsel were informed by the general counsel for the Brotherhood that the officers intended to carry out the directions given them by the Convention (R. 63). No mention was made of any alleged interpretation by the President of the Brotherhood in any way modifying the action of the Convention.

Complainant filed her bill of complaint on the 29th of September, 1931, on behalf of herself and all other beneficiaries similarly situated.

Complainant alleged that the funds of the department

were trust funds in which the beneficiaries held a prior claim; that the officers of the Brotherhood, who had been appointed as trustees of the said fund, were about to execute the expressed intention of the Convention to distribute the said funds among the living members and thereby place the assets beyond the reach of the complainant and all others similarly situated; that she was entitled as a matter of equity to have an accounting made by the Trustees and to have the Court take charge of the affairs of the department, fix the priorities of the matured claims and require a proper liquidation and administration of the department's funds (R. 1).

The bill first came on for hearing on the application for a temporary restraining order in the appointment of a Receiver.

In the course of the hearing the question of jurisdiction was raised by the defendants, and the Court held that the jurisdictional amount was involved.

In the order which was entered (R. 8) the Court found:

> "1. That the Widows' Pension Department was insolvent.
>
> "2. That no proper provision had been made for the payment of the holders of matured certificates who did not agree to accept the proposed settlements.
>
> "3. That the officers of the Brotherhood were about to comply with the action of the Convention and to make distribution of the fund contrary to the terms of the Constitution and By-Laws of the Brotherhood.
>
> "4. That the widows who refused to accept the proposed settlements were about to have their names erased from the pension roll.
>
> "5. That a temporary injunction should be granted against the Brotherhood and its officers restraining them from making disbursements from the said fund

except in the manner authorized by the Constitution and the terms of the Pension Certificates."

The Court having announced at the interlocutory hearing that the letter which was mailed on the 30th day of July, 1931 (R. 68), failed to advise the beneficiaries of their rights, new letters were prepared with the approval of the Court and mailed by the defendant to each of the beneficiaries. Copies of such letters are before the Court as defendant's Exhibit D (R. 86), Exhibit E (R. 88) and Exhibit F (R. 91).

A total of eighty-four widows were on the Pension Roll at the time the Court action was instituted. As a result of the letters, five of the sixteen with whom the settlements had been consummated returned their checks, and out of the fifty others who had previously agreed to accept the settlements, only twenty-two were willing to proceed with the settlements. This left fifty-one who refused the settlement.

The defendants then filed a motion to dismiss the bill of complaint upon the grounds of misjoinder and failure to state a valid cause of action in equity (R. 10), and the Court overruled such motion.

The cause subsequently came on for a final hearing. The answer (R. 13) admits that the fund in question, amounting to Two Hundred Seventy Thousand Dollars ($270,000), was held by the Brotherhood separately and apart from its other funds, admits the action of the Brotherhood in abolishing the Department virtually as alleged in the bill of complaint, and alleges that a new benevolent fund had been set up from which the pensioners are to be paid. It makes practically the same allegation as the bill of complaint regarding the attempt to settle for Fifteen Hundred Dollars ($1500) cash with each pensioner, and says (R. 17):

> "* * * that monthly payments of $35.00 per month have been made or tendered up to date to all pensioners who have not accepted settlement, including complainant Ella E. Pinkston: * * *."

Then follow allegations which are of peculiar interest in view of petitioners' present claim that less than Three Thousand Dollars ($3,000) is the subject of the controversy in this case. The answer (R. 18) proceeds:

> "Defendants further say that the present value of the securities and cash on hand in the Widows' Pension Fund is approximately $270,000.00; that to consummate settlements with twenty-two pensioners who have agreed to accept $1,500.00 each will cost $33,000.00; that the consummation of said settlements will leave a balance in the fund of approximately $237,000.00 with fifty-one pensioners on the Pension Roll; that if the settlements are not consummated there is an average amount on hand to meet each claim of approximately $3,700.00; that if the twenty-two settlements are consummated there will be an average amount in the fund to meet each claim of about $4,650.00 and that the consummation of the twenty-two settlements already negotiated will enhance the value of the fund on hand about $100,000.00 and enhance the average amount on hand for the remaining claims about $950.00 each.
>
> "Defendants further say that both the present value of each claim and the amount on hand to meet the claim of each pensioner on the Pension Roll is greatly in excess of $1,500.00; * * *."

The answer then alleges facts intended to show that there had been no dissipation or diversion of the fund and no improper actions by the officials.

The controversy thus made up by the pleadings was whether or not the defendants had administered properly

the trust fund of Two Hundred Seventy Thousand Dollars ($270,000) and whether complainant-respondent was entitled to an accounting of the fund and to have the fund administered under orders of the Court by a receiver appointed by the Court. It is not denied by the answer or otherwise disputed in the record that complainant-respondent was entitled to all the Thirty-five Dollar ($35) monthly payments then accrued.

In the course of the opening statement of counsel for the defendants the following colloquy took place between the Court and counsel (R. 26):

> "Mr. Stevenson: The plaintiff should show that the court has jurisdiction, in that it comes within the $3,000 in bringing it to this court. There is only one plaintiff.
>
> The Court: Well, the Court has passed on that question.
>
> Mr. Stevenson: The jurisdictional matter?
>
> The Court: Necessarily, in refusing to dismiss the bill.
>
> Mr. Stevenson: We didn't raise it.
>
> The Court: It raises itself."

Notwithstanding that the petitioners had failed in their answer or otherwise in the pleadings to raise any jurisdictional question, the District Court, of its own initiative, after hearing the case on its merits, ruled that the amount in controversy was less than Three Thousand Dollars ($3,000), and thereupon dismissed the case for want of jurisdiction, without passing on the merits, and notwithstanding that the evidence was conclusive that the present value of respondent's claim was in excess of Five Thousand Dollars ($5,000).

Petitioners-defendants' statement (page 4 of their petition for certiorari) that "the court found as a fact that the matter in controversy does not exceed the sum of $3,000,"

is misleading unless it is understood that the District Court's decision was one of law; that is, that on the admitted facts the amount in controversy was not based on complainant's expectancy or on the amount of the trust fund sought to be administered by the Court, but on the unpaid payments of Thirty-five Dollars ($35) per month as accrued at the time of the commencement of the suit. The right to those payments, however, was not denied and was not the subject of the real controversy, as above pointed out.

The ruling of the Trial Court was reversed by the Court of Appeals. This opinion is reported in 69 Fed. (2) 600.

Petitioners in their brief at page 5 refer to a petition for rehearing filed by them in the Circuit Court of Appeals (R. 116). They state that certain matter in regard to the settlements is disclosed by an affidavit filed by one of the officers of the Brotherhood, and that the affidavit also discloses that the remaining widows who have not made settlements are being paid monthly benefits in accordance with the terms of the certificates which they hold.

Respondent does not discuss this motion, for the reason that it raises matter outside the record. If the matter contained in the motion were properly in the record, respondent is in position to answer the motion.

THEORY OF RESPONDENT-PLAINTIFF'S CASE.

1. The funds of an Association composed of members upon whom assessments are made for the purpose of paying benefits for the widows of a deceased member, and not conducted for profit, are trust funds.

2. A court of Equity has jurisdiction to preserve and protect such trust funds, and to enjoin any threatened misapplication of the same.

3. Each member or beneficiary has the right in her own behalf and in behalf of all others similarly situated to institute proceedings for the purpose of securing a decree of specific performance requiring the Trustees to control and administer the funds according to the organic plan of the Association, and enjoining any wrongful administration or misapplication of such funds.

4. Each beneficiary or member has the right to insist on the use of the property in accordance with the Constitution and By-Laws of the Association and in accordance with the terms and stipulations of the certificates issued by the Association.

5. If such an Association becomes insolvent and is in such financial condition that it cannot be safely continued, then a Court of Equity should take charge of its assets and see that the same are properly distributed.

6. In the event of such liquidation by a Court of Equity, claims which have matured by reason of the death of a member have a preference over unmatured claims in the distribution of the assets of such Association, and any beneficiary of such matured claim has a right in her own behalf and in behalf of all others similarly situated to have a Court of Equity enter a decree fixing and establishing such priority.

7. In such actions and for jurisdictional purposes, the value of the matter in dispute may be determined by the value of the rights to be protected, or by the amount of the fund.

QUESTION.

The plaintiff holds a pension certificate providing for payments of $35.00 per month. Payments were in default at the time of the filing of the bill. The complainant had been advised that all other payments would be suspended. There were then unpaid less than $3,000, but complainant had a life expectancy of twenty-six years, and the net present value of her claim is in excess of $5,000. She sues in equity for an injunction, accounting and receivership in respect of the trust fund aggregating $270,000. Her individual interest in this fund is $4,650.00. The right to a continuation of the $35.00 payments per month is not in controversy. The payments cease upon the intervention of death or remarriage.

Under such circumstances is the amount in controversy in excess of $3,000.00?

ARGUMENT.

Whether or not the Lower Courts properly ignored the fact that the real controversy was as to an accounting and receivership of the trust fund of $270,000, in which plaintiff-respondent's actual interest was $4,650.00, we believe that the Court of Appeals was right in holding that the case was controlled by **Thompson v. Thompson, 226 U. S. 551.** That case has never been reversed by this Court, and stands as its authoritative pronouncement on the question sought to be raised herein.

The jurisdictional question arose in that case under an Act establishing a Court of Appeals for the District of Columbia, which permitted a review of any final judgment or decree of that Court in all causes in which the matter in dispute, exclusive of costs, should exceed the sum of $5,000.00.

A wife brought a suit for separate maintenance against her husband in the said Court of the District of Columbia, which awarded her a decree requiring her husband to pay her $75.00 per month. The question raised in the Supreme Court was whether or not the amount in controversy exceeded the sum of $5,000, even though the payments which had accrued were less than $5,000.

On this point the opinion by Justice Pitney says (page 559):

> "Under the decree of the Supreme Court the payments of $75.00 per month for the support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional

amount. The expectancy of life of the parties is clearly sufficient to make up the balance."

The opinion then proceeds (bottom p. 559) as follows:

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties, and it, of course, ceases wholly upon the death of the husband. (See Lynde v. Lynde, 181 U. S. 183; Audubon v. Shufeldt, 181 U. S. 575; Lynde v. Lynde, 64 N. J. Eq. 736, 751.)

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.

"The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record. In Smith v. Whitney, 116 U. S. 167, 173, the matter in dispute was stated to be 'whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars.' This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point (Smith v. Adams, 130 U. S. 167, 175; South Carolina v. Seymour, 153 U. S. 353, 358; Simon v. House, 46 Fed. Rep. 317, 318; Chesa-

peake & Delaware Canal Co. v. Gring, 159 Fed. Rep. 662, 664), and its authority upholds our jurisdiction in the case before us."

Petitioners seek to distinguish the Thompson case on the ground that the future payments under consideration were "fixed" by the Court's decree. They were, however, no more "fixed" than the $35.00 a month claimed by the respondent in this case. The rights of respondent had become "fixed" upon the death of her husband. She has a vested right to continue to collect the $35.00 a month payments as long as she lives. Nothing can intervene to defeat this right, except the dissipation of the fund.

The jurisdictional amount is tested by the status as it exists at the time the bill is filed. The fact that conditions may intervene in the future which will defeat the claim, or diminish its amount, does not defeat a present right to proceed in a Federal Court of Equity. If the amount involved when the suit is brought is sufficient to give a Federal Court jurisdiction, it does not lose such jurisdiction because subsequent events may reduce the amount.

A distinction is drawn by the Courts between law cases where a judgment is sought for a certain sum then alleged to be due on the one hand, and equity cases on the other where the object of the proceedings is the protection of the right which may not have accrued in its entirety, but is in large measure potential in its nature. This distinction is very clearly brought out in the case of **Western & Atlantic Railroad Company v. Railroad Commission, 261 U. S. 264, 67 Law. Ed. 645.** This case involved the right of the Railroad Commission to force the railroad to lay a certain sidetrack. It was contended by the Railroad Commission that the Federal jurisdictional amount

was not involved, in view of the fact that the cost of construction of the sidetrack would be only $1,266.24, and that the cost of maintenance was so indefinite as to amount and duration that the same could not be counted for the purpose of making up the jurisdictional amount. The District Court held, **275 Fed. 128**, "the cost in material and labor is stated in the petition to be but $1,260.00, and this amount alone is involved * * * the cost of future maintenance is not involved now because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, the question of its abandonment will be open then." The Supreme Court overruled the District Court, and held that even though the maintenance cost might fluctuate during future years, and might be defeated altogether by a decision to abandon the track, yet that it was proper to take into consideration such future maintenance costs in calculating the amount involved for jurisdictional purposes in equity.

Likewise, in the case of **Berryman v. Board of Trustees of Whitman College, 222 U. S. 334**, the Supreme Court held that in a controversy which involved **the right** to levy a tax over a period of years, that the prospective amount of taxes which would probably be levied during the future might be taken into consideration in calculating the amount in controversy. The distinction was drawn between a bill to cancel a particular tax levy, and one which attacked the potential right to levy. In the first instance, the amount involved is the actual face amount of the levy. In the second place the amount involved is the value of the taxes which are likely to be levied during the future. Under such circumstances, the determination of the amount in controversy appears upon an analysis of the relief prayed for. In this case the Court held that "it cannot

be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax **adding the sum of future taxes which might be levied to the amount of taxes actually levied** for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes."

While a District Court decision, yet a very clear expression of the principle of law involved is made in the case of **Mutual Life Insurance Co. v. Rose, 294 Fed. 122.** In this case a bill to cancel a life insurance policy which provided for double liability in the event of accidental death was under consideration. During the trial of the case it was urged that the insured had died of tuberculosis since the bringing of the suit, and, therefore, there was no possibility of the contingency of accidental death intervening. The Court held, however, that there was a possibility of it happening when the suit was brought, and, therefore, the jurisdictional amount was involved, because jurisdiction appears on the situation which existed at the time the suit is brought and not on what may happen in the future.

In the present case the complainant has a vested right to collect $35.00 per month as long as she elects to remain single. It is within her power to elect to remain single. Conversely, she may or may not marry. The ability to marry is contingent upon the intervention of an additional element, that is, the consent of the second party to the marriage contract. We submit that for jurisdictional purposes the amount in controversy is tested by the present potential right, and is not to be defeated by the thought

that some condition subsequent may intervene in the future which will diminish the present prospective recovery.

This distinction between law cases and equity cases is clearly brought out by comparing the case of **Wright v. Mutual Life Insurance Co., C. C. A. 5, 19 Fed. (2) 117,** same case, **276 U. S. 602,** cited by petitioners in their brief at page 16, and the later decision by the same Circuit Court of Appeals in the case of **New York Life Insurance Co. v. Swift, C. C. A. 5, 38 Fed. (2) 175.** The Swift case was a suit in equity to cancel an insurance policy, and the Court held that the jurisdictional amount was governed by the potential liability, and not by the accrued cash surrender value. The Court said, in a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount. In other words, the value of the right to be protected. If that exceeds $3,000.00, the District Court has jurisdiction regardless of the amount of damage that has presently accrued. In reference to the Wright case, the Circuit Court of Appeals said:

> "That case is easily distinguishable from the case at bar (Swift case), for there the policy had matured and was payable in installments. The suit was brought by the beneficiary in a state Court for recovery of the monthly installments then due, amounting to only $420.00."

Likewise, on page 16 of their brief, counsel for petitioners cite the following cases:

La Vecchia v. Conn. Mutual Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.; Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349, 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019, 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454, 154 S. E. 738.

Each of these cases are law cases in which a judgment was prayed for the recovery of a certain sum.

In the instant case, as in the Swift case, supra, the respondent is not suing at law, and is not asserting a claim against the petitioners for the amount of any accrued monthly payments. She is asking for no money judgment against the defendants, but is in a Court of Equity (probably the only Court to which she has recourse) asking that her vested rights as a beneficiary in the trust funds of an insolvent Association be protected and preserved by order of Court.

If the District Court, instead of dismissing respondent's case, had decided it on the merits in favor of the plaintiff-respondent, it would have issued a decree requiring the appointment of a Receiver of the large fund of which the complainant-respondent's individual interest was $4,650.00, or would have enjoined disbursements therefrom, except under Court order, and would have ordered an accounting of the fund as respects the alleged wrongful transactions of the defendants-petitioners. The decree also would no doubt have provided that the complainant should be paid the installments then, or thereafter, due, but that would have been only incidental to the main provisions of the decree. That did not constitute the relief which was sought by the bill of complaint. Her right to a continuation of

the payments was not denied by the answer, and was not really the subject of the controversy. The real controversy was whether or not the Brotherhood could arbitrarily put an end to the fund, fix a certain sum as a compromise of complainant's claim, and decide, in the event that she and others similarly situated refused to accept said proffer, that their names would be stricken from the Pension Roll, and their rights abrogated. What the complainant was seeking was protection to her potential right to the future payments.

Therefore, law cases in which no such equitable relief is prayed, and in which a judgment is asked for in an amount less than the jurisdictional sum, can have little bearing upon the controversy under consideration.

Petitioners rely upon the case of Dunbar v. Dunbar, 190 U. S. 340, 47 Law. Ed. 1084. The question involved in that case is whether or not a claim for alimony is of such a character as can be provable in bankruptcy, that is, could a judgment be rendered fixing a definite sum then due in extinguishment of the alimony claim? The Court held that under the requirements of the Bankruptcy Act of the United States this could not be done.

Opposing counsel have not only overlooked the fact that the Dunbar case is thus distinguished from the Thompson case, but have also seemingly overlooked the fact that the actuarial testimony related not only to what complainant-respondent would in fact receive in the future, but also related to the present value of the rights or expectancy in question. In the report of the committee of the Association to its Convention (R. 78), the potential claims of the widows were as a matter of fact reduced to "their present value." The committee reported that it had considered the contingencies to which the widows' rights were subject. We quote from the report as follows:

"The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40 is the present value of a pension of $420 per annum on the life of a woman aged 36, **taking into account the chances of remarriage**. The benefit has a definite 'lump sum' value on the death of the member" (R. 78).

Likewise Arthur Pipe the defendants'-petitioners' actuary testified (R. 60) that respondent's right, subject to the contingencies involved herein, had a present value of approximately $6,000.00. He testified that in making his study of the fund he contemplated the contingency of remarriage as well as the contingency of death; that sufficient records have now been established through various Pension Departments that from such statistical data the probability of remarriage can now be actuarily determined.

Further, in the letters which were mailed out by the Brotherhood to the widows, it was conceded that the liability of the Department was measured by the present value of the rights of the beneficiaries.

The Rule in Injunction Cases

On the jurisdictional question it is held that the rule applicable to injunctive actions generally should be applied to this action. This action is in part one for an injunction. Complainant-respondent is asking that the funds be preserved. She asks that the defendants be en-

joined from carrying out their avowed intention of disbursing the funds.

In injunction actions it has been invariably held that the test of jurisdiction is not the damage which the plaintiff has already sustained, but is the value to the plaintiff of the right which he asserts, and for which he prays protection. This rule is laid down in Foster on Federal Practice, Volume 1, Section 13, as follows:

> "In a suit for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value to the plaintiff of the right for which he prays protection; or the value, to the defendant, of the acts of which the plaintiff prays prevention; together with the amount of the damages which the plaintiff claims that he has already sustained and prays to have awarded to him. It is not limited by the amount of damages claimed by plaintiff to have already accrued. It has been held that the amount of such damages cannot be considered nor added to the value of the right sought to be protected."

Countless cases are cited in the text in support of such statement. Among other cases so holding are the following:

> Smith v. Whitney, 116 U. S. 167 (Quoted in the Thompson case);
> Bitterman v. L. & N. Railroad Company, 207 U. S. 205;
> Hunt v. New York Cotton Exchange, 205 U. S. 322.

The Circuit Court of Appeals for the Sixth Circuit applied this rule in the case of Wisconsin Electric Company v. Dumore Company, 35 Fed. (2) 555, in which, as stated in the first paragraph of the syllabus, it was held:

> "Federal Court's jurisdiction of suit to enjoin un-

fair competition depends, not alone on pecuniary damage resulting from acts complained of, but also on value of rights which plaintiff asks to have protected."

Under such rule it is unnecessary to go beyond the testimony of defendants' witness Pipe to sustain jurisdiction in the instant case. He testified that the present value of complainant's right in the fund approximated $6,000.00 (R. 62). It is that right which complainant-respondent asked to have protected in this action.

As to Jurisdiction Being Tested by the Amount of the Fund.

Respondent asks that a trust be declared in and of the Widows Pension Fund and that such fund, now admittedly insolvent, be administered under order of the court. The fund so referred to approximates $300,000.00 in value, and it is submitted that the jurisdiction herein might be sustained on such ground alone.

The funds of a mutual benefit society are merely held by it in trust. The beneficiary holds the equitable interest in such funds, and this right can only be determined by a bill in equity (19 R. C. L., page 1319, paragraph 106).

An association composed of members upon whom assessments are made for the purpose of paying death benefits is in the nature of a trust, and a court of equity has jurisdiction to protect the trust fund.

Dill et al. v. Supreme Lodge, 226 Federal Reporter 807;

Stamm v. North Western Mutual Beneficial Association, 65 Michigan, page 317, 32 N. W. 710, Text 716.

It has been held in many cases brought for the administration of a trust fund that the amount of the fund or property to be administered determines the question of jurisdiction. It was so held in the case of Handley v. Stutz, 137 U. S. 366, in which the court said:

> "The trust fund so administered and ordered to be distributed by the Circuit Court amounting to much more than $5,000.00, the Appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum."

One of the leading cases on this point is that of Jones v. Mutual Fidelity Company (C. C. Del.), 123 Fed. 506, and other cases so holding are the cases of—

Putnam v. Timothy Dry Goods & Carpet Company (C. C. Tenn.), 79 Federal 454;
Kelly v. Graphite Company (D. C. Ala.), 34 Federal (2d), page 791;
Conway v. Bank & Trust Company (C. C. Ky.), 185 Federal 950;
Hotel Company v. Wade, 97 U. S., page 20;
Towle v. American Building Loan Investment Society, 60 Federal 131 (C. C. Ill.);
King v. Kansas City Police Relief Assoc., 60 Fed. (2d) 547 (D. C. Missouri);
Local No. 7 v. Bowen et al., 278 Fed. 271 (D. C. Texas).

In such cases it is not a matter of aggregating the claims of the various parties interested in the fund. The decisions proceed on the theory that where a trust fund is the subject of the action and the court's jurisdiction is invoked by one having a beneficial interest in such fund, the jurisdiction is properly tested by the amount of the fund rather than by the amount of plaintiff's claim.

Petitioners at Page 10 of their brief have referred to the case of Eberhard v. North Western Mutual Life Insurance Company, 241 Fed. 353.

In that case the defendant was a **solvent** insurance company and each of the plaintiffs was a party who separately and individually had contracted with the defendant corporation. The rights of the plaintiffs were measured by their several contracts and the relationship of each of the plaintiffs to the defendant was that of two contracting parties and not that of trustee and beneficiary. There was no community of interest between the various plaintiffs and the case would seem clearly distinguishable on such ground. In its opinion the court said:

> "It cannot be doubted that such rights as each policyholder has depend upon his contract with the insurance company and are measured by its terms. The policy is an agreement to pay its holder a computable sum of money upon certain conditions. **His interest does not depend upon, and is not related to the interest of any other policyholder similarly situated** * * *. The sole matter in dispute is between the defendant and each complainant as to the amount the latter shall recover. Each policyholder has no demand upon any other; his demand is against the defendant alone, and what he may receive from the defendant can in no way affect the claims of others. The policyholders' claims to the fund are several, and not joint, and the amount payable to each depends upon his contract alone. Under these circumstances the separate claims cannot be aggregated for the purpose of making a case within the jurisdiction. The test to be applied will be found in a number of cases."

In the instant case neither Complainant nor the other beneficiaries have contracts enforceable at law. The sole

relationship between defendants and the beneficiaries is that of trustee and beneficiary. The beneficiaries' claims are based upon one and the same trust agreement, i. e., the Constitution of the Brotherhood as in force when their rights arose. The only claim of Complainant and other beneficiaries is against the trust fund, and their only right is the right to the proper administration of that fund. That the beneficiaries have a common and undivided right and interest in the fund cannot be questioned, and the Eberhard case, in which aggregation of claims was necessary to confer jurisdiction, would seem clearly distinguishable. The distinction would seem to be pointed out by the court in the portion of its opinion above quoted.

Similarly, in the case of Lyon Bonding Company v. Karatz, 262 U. S. 77, and as pointed out in the first paragraph of the syllabus, the Complainant was a simple contract creditor. There again there was no community of interest or title between the several claimants, and the court, at page 86 of its opinion, says:

> "Nor is it (this action) like those cases in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount."

SUMMARY.

Respondent, as a cestui que trust, holds a beneficial interest in the assets of a Mutual Benefit Society. These assets have uniformly been construed to be trust funds. Respondent's claim matured and became vested upon the death of her husband. This right continues, unless defeated by the intervention of some condition subsequent.

It was the express purpose and intent of the Brotherhood to fix an arbitrary sum for settlement of this vested right. If respondent refused to accept this arbitrary sum, then the Brotherhood proposed to cut off this present right and leave her without recourse, except in the courts. The penalty for clinging to the provision made for her by her deceased husband was that she should be stricken from the Pension Roll.

This case does not involve merely the right to a present judgment for the accrued monthly payments, but brings in issue the right of protection to all of the future payments to which respondent is now entitled. The amount in controversy for jurisdictional purposes is the value of this right, as it now exists.

Respectfully submitted,

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